Filed 10/27/09 Hughes v. Lockheed Martin Corp. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARK HUGHES et al., Plaintiffs and Appellants, v. LOCKHEED MARTIN CORPORATION, Defendant and Respondent.	E046862 (Super.Ct.No. RCVRS31496) OPINION

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Engstrom, Lipscomb & Lack, Walter J. Lack, Brian Depew, Gary A. Praglin, Richard P. Kinnan and Ann A. Howett; Girardi & Keese, Thomas V. Girardi and Howard B. Milller; Masry & Vititoe and James Wilson Vititoe, for Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, Robert S. Warren, Robert W. Loewen, and Jeffrey D. Dintzer, for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs Mark Hughes and other individuals[1] appeal from a judgment of dismissal of their complaints against defendant Lockheed Martin Corporation (Lockheed) on the ground that the five-year statute (Code Civ. Proc.,[2] § 583.310) had run. Plaintiffs contend: (1) the trial court should have found that Lockheed was estopped from using the five-year statute as the basis for its motion for dismissal; (2) the trial court should have found that trial within the five-year statutory deadline was impossible, impractical, or futile; (3) with respect to certain plaintiffs who filed their claims later than the others, the trial court should have found that mandatory tolling applied such that the five-year statute did not bar their claims; and (4) the trial court erred in dismissing because the case was subject to a tolling period that ended within six months of the five-year deadline (§ 583.350). We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

In the late 1990's, approximately 800 individuals filed 12 separate complaints against Lockheed alleging various causes of action based on toxic contamination of the groundwater supply of the City of Redlands. In 1998, the trial court consolidated the complaints for pretrial purposes. In 1999, the trial court bifurcated the pretrial

---

[1] Leigh Hunt, Deborah Mach, Derek Schott, Vickie Castro, Holly Castro, Evan Castro, Garrett Castro, Brian Hayes, Christopher Hayes, Michael Hayes, Patrick Hayes, Abraham Leal, Kimberly Scott, Joey Coffey, Autumn Coffey, Tish Lopez, Walter Rorer II, and Hans Scheibe.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

proceedings by requiring that discovery and pretrial motions relating to certain designated first-tier plaintiffs be completed before a schedule was established for such matters relating to the remaining plaintiffs.[3]

After extensive discovery was completed with respect to the first-tier plaintiffs, Lockheed moved for summary judgment and/or summary adjudication. The trial court denied the motions, and Lockheed filed a writ petition with this court. Meanwhile, a trial date was set for April 25, 2005, but on March 28, this court ordered a stay of all proceedings. The stay extended to at least October 12, 2006, when this court issued its remittitur in those writ proceedings.

On June 12, 2008, following extensive hearings on motions in limine, the trial court entered an order excluding all three medical causation experts plaintiffs had designated. Plaintiffs concede the order "eviscerated" their case.

A stipulation was then in effect extending until August 4, 2008, the five-year deadline to bring the case to trial. On July 17, plaintiffs' counsel sent Lockheed's counsel a letter proposing a new stipulation to extend the five-year deadline to February 4, 2009. Lockheed's counsel rejected the proposed stipulation on July 18, 2008.

---

[3] Unless the context indicates otherwise, further references to "plaintiffs" in this opinion are to the first-tier plaintiffs.

On July 24, 2008, plaintiffs filed a motion to extend the five-year deadline on the ground that it would be impossible, impracticable, or futile to bring the action to trial within the current stipulated period. On August 1, the trial court denied that motion.

On August 6, 2008, Lockheed filed a motion to dismiss under the five-year statute. On August 22, plaintiffs filed a motion to specially set the case for trial. However, on September 23, the trial court entered an order dismissing plaintiffs' claims for failure to bring their case to trial by the August 4 deadline. The trial court stated in its order, "The size, length, and complex nature of this litigation are well-known to the court, as well as the various requests for delays to accommodate schedules of counsel for all parties. However, the [p]laintiffs had an affirmative duty to be aware of the stipulated five year period and to take all reasonable steps to ensure that this matter was brought to trial before expiration of that time."

This appeal ensued.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. The Five-year Statute

Plaintiffs raise a multi-pronged challenge to the trial court's dismissal of their action based on the expiration of the five-year statute, section 583.310. That section provides, "An action shall be brought to trial within five years after the action is commenced against the defendant." (§ 583.310.) Unless an exception applies as provided by statute, failure to bring an action to trial within five years results in

mandatory dismissal of the action. (§ 583.360, subd. (b).) The parties may extend the time within which an action must be brought by written stipulation or by oral agreement made in open court. (§ 583.330, subds. (a), (b).) The five-year period is tolled when: "(a) The jurisdiction of the court to try the action was suspended. [¶] (b) Prosecution or trial of the action was stayed or enjoined. [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (§ 583.340.)

"'The dismissal statutes, like statutes of limitation, "promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed. The statutes also protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time." [Citations.]" [¶] This legislative policy, however, is tempered by judicial concern that subject to a plaintiff's exercise of reasonable diligence, an action should be tried on the merits wherever possible. [Citation.] Where these policies conflict, the judicial policy predominates. [Citation.]" (*Holder v. Sheet Metal Worker's Internat. Assn.* (1981) 121 Cal.App.3d 321, 325 (*Holder*).) We therefore construe the dismissal statutes liberally, consistent with the policy of favoring trial on the merits. (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1270 (*Sanchez*).)

B. Estoppel

Plaintiffs first contend that, based on a "decade-long history of promises and actions by Lockheed to extend the five-year date so as to ensure a trial on the merits,"

Lockheed was estopped from denying an extension of the deadline for trial when requested to do so on July 17, 2008.

1. Additional Background

Early in the litigation, the trial court issued a case management order which, among other things, established a group of first-tier plaintiffs and set a discovery schedule for those first-tier plaintiffs. At a hearing on September 28, 2001, plaintiffs' counsel requested, in effect, an open-ended extension of the five-year rule. Lockheed's counsel responded, "We understand that we're not going to try 800 – 700 people by March of 2004. We understand that. But what we didn't want to do was proceed on any basis that didn't recognize that the [first tier plaintiffs] *were going to have some limit, that we were not going to indefinitely extend*." (Italics added.) Thereafter, the parties executed a series of stipulations to extend the five-year deadline.

In their status conference statement dated October 30, 2006, plaintiffs advised the trial court that the matter was "ready to be set for trial." They informed the court that all discovery had been completed, witness and exhibit lists had been exchanged, and all motions in limine and motions to exclude expert witnesses had been filed. The only thing that remained to be done was to agree upon a "schedule to efficiently and rapidly resolve all outstanding law and motion and get this case to trial." Plaintiffs' counsel also stated that it was of "paramount importance" to get an "immediate resolution of the five year issue." Plaintiffs' counsel set forth the previous stipulation to extend the five-year deadline and stated, "[I]t is apparent that a new stipulation with respect to the five year

must be the *first* order of business." Plaintiffs' counsel requested that Lockheed's counsel "be prepared to orally stipulate" at the status conference to an extension sufficient to allow resolution of pretrial motions and final trial preparation. At another status conference on April 9, 2007, plaintiffs' counsel represented to the court that the case was "ready to go to trial as soon as you can handle it."

Counsel for both parties entered into a series of stipulations successively extending the five-year expiration for six-month intervals. Those and previous stipulations provided: "Defendants hereby advise that they will not stipulate to any further extension as to any of the First Tier Plaintiffs . . . whose claims have neither been dismissed nor are the subject of rulings by the Court of Appeals."

Plaintiffs opposed Lockheed's motion to dismiss on the ground of estoppel, but in granting Lockheed's motion to dismiss, the trial court rejected the estoppel argument, explaining as follows: "[T]here can be no question that numerous stipulations were executed to extend the five year statute of limitations. Each stipulation contained language that Lockheed reserved the right to not stipulate to further extensions as to any plaintiff designated as a first tier plaintiff. Counsel for Lockheed . . . has submitted reply declarations pointing out that during the course of this litigation he expressly rejected the idea of an open-ended extension. He has also attached correspondence to [counsel for plaintiffs] indicating that his client's approval was necessary to enter into a stipulation to extend the five-year statute. [Citation.] Although stipulations had been entered into in the past, there was no guarantee that a stipulation was forthcoming."

2. Standard of Review

Whether estoppel has been established is generally a question of fact for the trial court. (*Cole v. City of Los Angeles* (1986) 187 Cal.App.3d 1369, 1374.) We do not disturb the trial court's findings of fact on the issue unless the findings are not supported by substantial evidence. (*County of Sonoma v. Rex* (1991) 231 Cal.App.3d 1289, 1295-1296.) Moreover, on appeal, we view the evidence in the light most favorable to the trial court's findings; in doing so, we do not reweigh the evidence, but we indulge all reasonable inferences that favor those findings. (See, e.g., *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1360.)

3. Analysis

Under the doctrine of estoppel, "'"a person may not lull another into a false sense of security by conduct causing the latter to forebear to do something which he otherwise would have done and then take advantage of the inaction caused by his own conduct." [Citations.]'" (*Holder*, *supra*, 121 Cal.App.3d at p. 325.) In *Holder*, after the defendant's counsel requested and was granted a continuance of trial until a date after the three-year deadline of former section 583, subdivision (c) had run, the defendant's counsel then sought and obtained a dismissal of the action on the ground that more than three years had expired. The Court of Appeal reversed, holding that "[w]hen a defendant selects a trial date beyond the three-year period, he shows his willingness to excuse delay and his apparent satisfaction with his state of preparedness for trial. . . . [T]o deny the application of estoppel is tantamount to giving a judicial imprimatur to the conduct of

lawyers inconsistent with their role as officers of the court. . . . Here, [defense counsel] represented to opposing counsel he wished to continue the case for trial. In his motion for continuance he made that same representation to the court. Having made that bargain, he is bound by it." (*Holder*, *supra*, at p. 327.)

Holder is distinguishable on its facts. As early as 2001, Lockheed rejected plaintiffs' attempts to obtain an open-ended extension of the five-year deadline. Instead, Lockheed's counsel stated that he was "not going to indefinitely extend." The trial court found that each stipulation thereafter to extend the trial deadline was individually negotiated between counsel on the understanding there was no agreement until a formal stipulation was signed, and Lockheed's counsel made it clear that such a stipulation required the client's approval. Substantial evidence supports those findings. For example, at a hearing before the discovery referee in October 2003, the referee noted that trial was supposed to be in November of the following year. Counsel for Lockheed stated, "And there will not be enough time for the various motion practice between October the 1st and that date. And Judge Kayashima . . . thought it was quite reasonable of me to extend the five-year statute to November 15 and did not press me for more. So that is my instructions from my client is November 15, and that is the date that the court has calend[a]red for the trial." Again, in January 2008, when plaintiffs requested Lockheed to execute a new stipulation to extend the trial deadline to August 4, counsel for Lockheed replied that he would discuss the matter with his client before agreeing to the stipulation. Moreover, as noted above, each stipulation explicitly provided that

Lockheed reserved the right to not stipulate to any further extensions as to the first-tier plaintiffs. In entering into a written stipulation, counsel is deemed to have understood what he executes. (*Martin v. Cook* (1977) 68 Cal.App.3d 799, 809.)

Finally, at a hearing on November 14, 2006, the court and the parties discussed scheduling issues, pretrial motions, and the five-year statute. Counsel for Lockheed stated, "[I]n other words, if to complete all of these various motions, et cetera, reasonably takes until April, then we'll agree to May 15, or something like that, five-year extension to accommodate the schedule." Thus, in 2006, Lockheed's position was that it would agree to a trial date approximately six weeks after rulings on motions in limine. Plaintiffs could not reasonably have expected more, and therefore could not reasonably have relied to their prejudice on any conduct or representations on Lockheed's part.

We conclude substantial evidence supports the trial court's finding that plaintiffs did not establish estoppel.

C. Impossibility/Impracticability/Futility

Plaintiffs next contend the trial court erred in dismissing their complaints under the five-year statute because it was impossible, impracticable, or futile to bring the matter to trial within the five-year period. (§ 583.340, subd. (c).)

1. Standard of Review

The determination whether it is impossible, impracticable, or futile to bring an action to trial is within the trial court's discretion, and we review the trial court's determination only for abuse of discretion. (*Sanchez*, *supra*, 109 Cal.App.4th at p. 1271.)

2. Analysis

The critical factor in determining whether to toll the five-year period based impossibility, impracticability, or futility is whether the plaintiff has exercised reasonable diligence. (*Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 Cal.App.3d 1476, 1482.) The plaintiff has the burden of making every reasonable effort, even in the last month. (*Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526, 1532 (*Baccus*).)

Plaintiffs contend they exercised all due diligence to prepare the matter to trial and to have the matter set for trial within the five-year deadline, and it would have been impossible to get the matter to trial before August 4, 2008. Plaintiffs base their argument on the following facts: On June 12, 2008, the trial court issued its ruling granting Lockheed's Evidence Code section 402 motions to exclude all of plaintiffs' specific causation experts. Plaintiffs received the order on June 17. The jury commissioner had previously stated she required six to eight weeks before the trial date to get a jury panel ready, and the trial court had previously announced it would require a week to process and evaluate the juror questionnaires. In addition, further pretrial motions and other matters remained to be resolved, which Lockheed had previously indicated would require up to five weeks.

In asserting that bringing the matter to trial by August 4, 2008, would have been impossible, impracticable, or futile, plaintiffs note that in the dismissal order, the trial court stated that "[i]t may have been difficult to have the trial commenced before the August 4, 2008, date . . . ." However, "difficult" does not mean impossible,

impracticable, or futile within the meaning of section 583.350, subd. (b). The trial court further stated, "Although it would have been difficult to seat a jury within the remaining time, Plaintiffs made no effort to take steps to do so. There is no indication that Plaintiffs sought to obtain a new stipulation to extend the five-year period during the lengthy expert witness hearings or that any steps were taken at all until July 17, 2008, less than two and one-half weeks before expiration of the five-year period to obtain a new stipulation. Although stipulations had been entered into in the past, there was no guarantee that a stipulation was forthcoming. After the court issued its rulings, Plaintiffs should have been prepared to either file the writ petition and seek a stay of the proceedings or to immediately move to specially set the action for trial to avoid the time limitations of [Code of Civil Procedure section] 583.310. Plaintiffs failed to proceed under either option." And "'[w]here a plaintiff possesses the means to bring a matter to trial before the expiration of the five-year period by filing a motion to specially set the matter for trial, plaintiff's failure to bring such motion will preclude a later claim of impossibility or impracticability.'" (*Lauriton v. Carnation Co.* (1989) 215 Cal.App.3d 161, 165.)

Plaintiffs also contend that it would have taken a "minimum" of nine weeks to bring the matter to trial, and nine weeks from June 17 would have been beyond the five-year deadline of August 4, To reach that figure of nine weeks, plaintiffs assume the jury commissioner would have required eight weeks, and the trial court had indicated it would take one week to review juror questionnaires. However, the jury commissioner had stated in 2004 she would require six to eight weeks to obtain a long cause panel. As for

the one week for the trial court to review questionnaires, jurors must be sworn before they fill out questionnaires. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1176; § 232, subd. (a).) Commencing the jury selection process marks the beginning of trial for purposes of the five-year rule. (See *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 390.) Thus, the actual minimum time before trial could commence was six weeks, not nine. As of June 17, 2008, seven weeks remained before the August 4 deadline.

Plaintiffs also assert that Lockheed itself had budgeted five weeks of pretrial work to be completed after the exclusion orders were made. However, plaintiffs have not explained why they could not request a trial date before those matters were resolved.

Finally, plaintiffs contend they conducted the entire litigation with diligence, and to establish diligence, they provided a lengthy declaration of their counsel accompanied by various exhibits that demonstrated their efforts over 10 years to get the case to trial, including more than 10 appeals and writ petitions to this court and to the California Supreme Court, more than 500 days of depositions, and 61 days of hearings on pretrial motions. We will assume plaintiffs have established diligence in all the proceedings up to June 12, 2008. However, plaintiffs' efforts during the early stages of the litigation are largely irrelevant to the issue of whether plaintiffs demonstrated diligence *after* June 12. Rather, courts have recognized that the "level of diligence required increases as the five-year deadline approaches." (*Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 336), and "[i]t is then that the greatest diligence is required" (*Wilshire Bundy Corp. v. Auerbach* (1991) 228 Cal.App.3d 1280, 1287).

With respect to their efforts after June 12, 2008, plaintiffs contend that immediately following receipt of the trial court's order of that date, they began working on writ petitions to challenge that order. However, as the trial court noted with respect to diligence, "Plaintiffs apparently felt no urgency to have the writ petitions completed and filed with the Court of Appeal by August 4, 2008 and to seek a stay because Lockheed had entered into stipulations in the past extending the five year statute of limitations. Plaintiffs were undoubtedly aware that an extensive number of expert witness motions had been heard and were to be decided. In particular, Plaintiffs knew that at least two of their experts, Drs. Gale and Chopra, had already been found not to have expressed the necessary opinions on the issue of medical causation and were subject not only to the [Evidence Code section] 402 motions but motions based on law of the case, and should have been prepared to proceed as necessary. Plaintiffs also knew that the extensive hearings on the expert witness motions concluded in May 2008 and could have, but did not, seek an extension of the five year statute prior to the court's ruling. In fact, Plaintiffs did not seek a stipulation to extend the five year statute until July 17, 2008, slightly more than one month after the court's ruling was issued on June 12, 2008. The July 17, 2008 date was only 18 days before the expiration of the five year statute."

The trial court concluded, "After the court issued its rulings, Plaintiffs should have been prepared to either file the writ petition before expiration of the five year statute and seek a stay of the proceedings or to immediately move to specially set the action for trial to avoid the time limitations of [Code of Civil Procedure section] 583.310. Plaintiffs

failed to proceed under either option. Plaintiffs moved belatedly to specially set the case for trial on August 22, 2008. It may have been difficult to have the trial commenced before the August 4, 2008 date, but Plaintiffs cannot claim impossibility or impracticability without having taken any steps to do so."

We agree with the trial court that plaintiffs failed to establish reasonable diligence following the trial court's June 12 order. The trial court did not abuse its discretion in finding that it was not impossible, impracticable, or futile to bring the matter to trial. (*Sanchez*, *supra*, 109 Cal.App.4th at p. 1271.)

D. Hayes Plaintiffs

Plaintiffs contend that on August 4, 2008, the five-year statute had not yet run with respect to the claims of Brian Hayes, Christopher Hayes, Michael Hayes, and Patrick Hayes (the Hayes plaintiffs), and the trial court therefore erred in dismissing their claims.

1. Additional Background

The Hayes plaintiffs' action was commenced on January 4, 2002,[4] when their cases were filed by means of the seventh appendix to the operative complaints.[5] The Hayes plaintiffs contend that because they were not yet first-tier plaintiffs, all discovery

[4] Lockheed suggests the correct date should be January 2, 2002. Whether the action commenced as to the Hayes plaintiffs on January 2 or January 4 does not affect our analysis.

[5] Audrey Hayes was named as a plaintiff in an action filed on March 26, 1998, and she was identified as a first tier plaintiff in August 1999. She died on November 11, 2001, and the complaint was amended in January 2002 to substitute wrongful death claims on behalf of her heirs.

and trial proceedings with respect to them were stayed under the third case management order. On February 14, 2002, the trial court granted their motion to be added to the group of first-tier plaintiffs, and as a result, the stay of their claims was then lifted. They contend that only then did their cases become active. They contend the action was stayed within the meaning of section 583.340, subdivision (a), and the five-year deadline was therefore tolled, (1) from January 4, 2002, to February 14, 2002, the time between the filing of their complaint and the trial court's order adding them to the group of first-tier plaintiffs; (2) from March 28, 2005, to October 12, 2006, pursuant to a stay this court issued in connection with writ proceedings; and (3) from either October 12, 2006, or November 14, 2006, to February 28, 2007, when Lockheed filed a challenge to Judge Kayashima under section 170.6 and brought related writ proceedings. The Hayes plaintiffs calculate that the action was therefore tolled for 710 to 731 days, and the five-year statute therefore did not run as to them until either December 15, 2008, or January 5, 2009.

When the Hayes plaintiffs moved to be added to the group of first-tier plaintiffs, Lockheed vigorously objected. Plaintiffs asserted that the addition of the Hayes plaintiffs as first-tier plaintiffs would not affect the litigation. Plaintiffs' counsel represented that the only additional discovery required would be the depositions of the Hayes plaintiffs, and Lockheed would not be prejudiced if the Hayes plaintiffs were added as first tier plaintiffs. Specifically, plaintiffs' counsel stated in a declaration, "Under the circumstances in this case, there is no reason not to have the wrongful death case of

Audrey Hayes heard along with the other First Tier cases. Lockheed will not be prejudiced in any way by allowing the wrongful death case to proceed. Conversely, if the wrongful death does not proceed now, it probably will not go forward for five years. The parties and their experts will have to start over and will result in unnecessary burden and unnecessary expenditure of judicial resources."

Since the Hayes heirs became first-tier plaintiffs, their counsel stipulated seven separate times to extend the five-year deadline. In 2006 and 2007, plaintiffs' counsel announced trial ready on behalf of all the first-tier plaintiffs. The trial court specifically found that the stipulations with respect to the five-year deadline applied to all first-tier plaintiffs, including the Hayes plaintiffs: "The parties stipulated that the five year statute would expire after . . . August 4, 2008. That time has now expired, and the claims of the Hayes plaintiffs, as well as the other first tier plaintiffs, are now barred by the five year limitation period of [Code of Civil Procedure section] 583.310."

2. Analysis

The Hayes plaintiffs assert, citing section 583.330, that "[a] stipulation may only extend the time to bring an action to trial, it may not shorten the time to bring an action to trial." Thus, they argue, the January 28, 2008, stipulation, extending the time for trial to August 4, did not apply to them because five years had not yet run as to them.

"A stipulation in proper form is binding on the parties if it is within the authority of the attorneys." (1 Witkin, Cal. Procedure (2008 supp.) Attorneys, § 264, p. 341 and cases collected.) Moreover, "[a]n authorized stipulation in proper form, unless contrary

to law, court rule, or public policy, is binding on the court." (*Ibid.*) An attorney has the authority "[t]o bind his client in any of the steps of an action or proceeding by his agreement filed with the Clerk, or entered upon the minutes of the Court, and not otherwise." (§ 283, subd. (1).)

Despite the unsupported assertion of the Hayes plaintiffs to the contrary, no law or policy prevents the parties from stipulating to bring a matter to trial within a shorter time frame than that provided by statute. On its face, the language of section 583.330 does not preclude a stipulation shortening the time for trial. The Hayes plaintiffs chose to join their claims to those of the other first-tier plaintiffs, and the trial court did not err in finding them bound by that choice.

Because we find that the trial court did not err in holding that the Hayes plaintiffs were bound by the stipulations, we need not examine whether tolling applied during each of the specific periods the Hayes plaintiffs have listed.

E. Applicability of Section 583.350

Finally, plaintiffs contend the trial court erred in dismissing because the case was subject to a tolling period that ended within six months of the five-year deadline (§ 583.350).

1. Additional Background

The parties each filed numerous motions in limine, and before commencing the hearings on those motions, the trial court stated that it would "hear all the motions and you get all of my decisions at one time. And the reasons for that is motions in limine do[]

not become the law of the case. A judge who makes that decision can change his own mind during the course of a trial." The court continued, "So I think I'll leave that until I have gone through all of the things and give you people to take it up, if you want to, either side and we'll see who's going to be trying the case. If it's going to be me, it's going to be done just before I pick the jury and adequate time for you people to be able to prepare . . . your case pursuant to my ruling on those motions."

After further discussion, the court stated, "I said to all of you before, after I do [all of the Evidence Code section 402 hearings], you'll have an opportunity to take it up. Either side can take me up on either decision that I make. And the reason why I'm saying that I'm not going to do the motions in limine before that time or right after that time is because I don't know who's going to go up with it and what decision is going to be on my ruling. If I'm not on the case, I've wasted your that time [*sic*] and your time. If I'm on the case, I'm telling you, I'll give you plenty of time before I call the jury panel to discuss the [*sic*] with you and get my rulings about the motions in limine. Remember, I told you when we talked to my jury commissioner as to how long it takes before we get the panel in?" The court concluded, "I'll give you sufficient time to get your cases together."

Before the trial court ruled on pretrial motions, the following exchange took place on May 8, 2007:

"THE COURT: . . . I probably will not render a judgment or a ruling for findings until the whole thing [expert witness exclusion motions] is over . . . .

[¶] . . . [¶]

"[LOCKHEED'S COUNSEL]: I understand that, and, in fact, I think there may be some merit to it. The only thing that I hope is that if they are all decided at once, that there is some hiatus so that if either side has something they want to take up at that point, they have some opportunity to do it.

"THE COURT: There's no question I'll give you the opportunity on both sides."

2. Analysis

Section 583.350 provides: "If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension."

Plaintiffs argue that section 583.350 applied in this case because the trial court proceedings were suspended while the exclusion motions were under submission, and the proceedings were subject to a "'hiatus'" pending the filing of writs in this court. Thus, plaintiffs assert, they had six months from the trial court's June 12 rulings to bring the case to trial.

Section 583.350 allows a six-month extension only when the statutory time is "tolled or otherwise extended pursuant to statute." (§ 583.350.) The statutory time is "tolled or otherwise extended pursuant to statute" when the trial court's jurisdiction is

suspended, the action was stayed, or bringing the action to trial was "impossible, impracticable, or futile." (§ 583.340.)

Although plaintiffs contend the trial court here suspended proceedings after it took the motions in limine under submission, plaintiffs have provided no citation to the record to support that contention. Thus, plaintiffs have failed to establish that the action was stayed within the meaning of section 583.350.

Normal delays in a case "caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are not within the contemplation of [the statutory] exemptions. [Citation.]" (*Baccus, supra,* 207 Cal.App.3d at p. 1532.) Nor, in our view, is time waiting for a ruling on a motion. Rather, contrary to plaintiffs' argument, the five-year deadline is tolled only in specific circumstances, and an unfavorable ruling is not one of them. (§ 583.340.) When none of the circumstances set forth in section 583.340 exist, dismissal under the five-year rule is mandatory. (§ 583.360, subd. (b); *Sanchez, supra,* 109 Cal.App.4th at p. 1269.)

Plaintiffs also contend section 583.350 applied because bringing the action to trial would have been impossible, impracticable, or futile. We have already rejected that argument in our discussion above and need not repeat our analysis here.

We conclude that on its face, section 583.350 does not apply.

IV. DISPOSITION

The judgment is affirmed. Parties to bear their own costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

GAUT
J.